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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

NO. [redacted]

PHILLIP COOKE, LEON WOLFE, GEORGE SIMKINS, JR., JOSEPH STURDIVENT, SAMUEL MURRAY, and ELIJAH H. HERRING, Appellants

vs.

STATE OF NORTH CAROLINA

Appeal from the Supreme Court of the State of North Carolina

BRIEF OPPOSING MOTION TO DISMISS

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 466

Phillip Cooke, Leon Wolfe, George Simkins, Jr.,
Joseph Sturdivent, Samuel Murray, and Elijah H. Herring

Appellants

v

State of North Carolina

Appeal from the Supreme Court of the State of North Carolina

BRIEF OPPOSING MOTION TO DISMISS

The above named appellants respectfully file this, their **Brief Opposing the Motion to Dismiss,** which motion has been filed herein by appellee, State of North Carolina.

Corrections In Statement of the Case

(a) Appellee says in its Statement of the Case (Page 4 of Motion to Dismiss): "The Court will further note that the State of North Carolina **was in no manner made a party to this civil action in the Federal Court.**" (Emphasis added.) Appellants believe that this is an incorrect statement of both fact and law.

The State of North Carolina was a party to the Federal Court proceedings in the only constitutional sense that it could have been a party to those proceedings. In the recent case of **Cooper v Aaron** (Decided September 29, 1958) ____ US ____ 3 L ed 2d 5, 16, this Court said:

"The command of the Fourteenth Amendment is that no 'State' shall deny to any person within its jurisdiction the equal protection of the laws. 'A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government . . . denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning.' Ex parte Virginia, 100 US 339, 347, 25 L ed 676, 679."

Indeed, it is now almost a truism in the decisions of this Court that the State of North Carolina was a necessary party in the constitutional sense, and that action by the State of North Carolina was a necessary factor to give the Federal Courts jurisdiction in **Simkins v Greensboro** to declare the "constitutional rights" of appellants under the Fourteenth Amendment and to find that the State of North Carolina had constitutionally violated those "constitutional rights." In **Shelley v Kraemer**, 334 US 1, 13, 92 L ed 1161, 1180, 68 S Ct 836, this Court said:

"Since the decision of this Court in the Civil Rights Cases, 109 US 3, 27 L ed 835, 3 S Ct 18 (1883), the principle has become firmly imbedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

It was therefore necessary for appellants to bring the State and its actions before the Federal Courts in order to show that the "constitutional rights" of appellants under the Fourteenth Amendment had been violated by the State, and that appellants were entitled to relief against such State action.

That the Federal Courts found that the State of North Carolina was a party in the only constitutional sense in which

it could have been a party and that there was wrongful action by the State in denying the "constitutional rights" of appellants can be clearly seen from the Federal Court proceedings. (See Statement as to Jurisdiction, Pages 10-16, 67-79.)*

It would indeed be anomalous if the State of North Carolina could be heard to say in effect in this case: "It is true that the State of North Carolina has violated the 'constitutional rights' of the appellants under the 14th Amendment. It is true that this State violation of appellants' 'constitutional rights' has been duly established by Declaratory Judgment of the United States District Court for the Middle District of North Carolina, duly affirmed by the Court of Appeals for the Fourth Circuit. It is true that the State's agencies were the defendants in that Declaratory Judgment and that their unlawful actions were held to be the unlawful actions of the State of North Carolina. But the State of North Carolina knows nothing about any of this on the ground that it was not by name a party to the Declaratory Judgment, and is therefore free to prosecute and punish appellants as criminals for exercising those very 'constitutional rights' which the Federal Courts have held were 'unlawfully denied' the appellants by the State of North Carolina."

(b) For some reason appellee ignores in its Statement of the Case the written Motion to Set Aside the Verdict filed by appellants in the trial court, which motion was not answered or denied by appellee, and which motion set out at length fundamental Federal rights of appellants which appellants alleged were being violated, which motion the trial court denied and which action of the trial court the Supreme Court of North Carolina used more than three printed pages (See Pages 50-53 of Statement as to Jurisdiction), in upholding as containing "no error."

Appellants believe that this pleading is a crucial part of this case, and does not deserve to be omitted from any Statement of the Case.

*See Note, Bottom Page 23.

ARGUMENT

I

Appellee's first argument in its Motion to Dismiss (Page 5) is:

"The Question of Racial Discrimination in the Use of the Golf Course Was Not Involved in This Case."

The only way such a contention can be made is:

(1) To ignore the Opinion of the United States District Court for the Middle District of North Carolina in **Simkins et al. v. City of Greensboro et al.,** (See Pages 10-16 of Statement as to Jurisdiction), which Opinion the Supreme Court of North Carolina said in its Opinion in this case was before the State Courts: **"Our knowledge of the facts in that case is limited to what appears in the published opinion."** (Page 50 of Statement as to Jurisdiction.) The Federal Court's Opinion shows abundantly that the question of racial discrimination was very much involved.

(2) To ignore appellants' Motion to Quash (See Pages 17-19 of Statement as to Jurisdiction) and Motion to Set Aside the Verdict (See Pages 20-25 of Statement as to Jurisdiction), which motions alleged in detail how the question of racial discrimination was involved, and which Motion to Set Aside the Verdict alleged verbatim the Declaratory Judgment of the Federal District Court as follows:

"It is now ordered, adjudged and decreed that defendants have unlawfully denied the plaintiffs as residents of the City of Greensboro, North Carolina, the privileges of using the Gillespie Park Golf Course, and that this was done solely because of the race and color of the plaintiffs, and constitutes a denial of their constitutional rights, and unless restrained will continue to deny plaintiffs and others similarly situated." (See Page 92 of Transcript of Record.)

(3) To ignore the testimony of one of appellee's chief witnesses upon the trial of this case. Clyde Bass, the Golf Assistant Pro in charge at the time involved, testified (See Page

41 of Transcript of Record): "To my knowledge, no Negroes have ever played at Gillespie Park Golf Course before this date. Some Negroes have presented themselves before this date to play, but none have played to my knowledge."

But the immediate question in this case is whether or not this Court has jurisdiction to examine the record to see whether or not the question of racial discrimination was involved. As sustaining this Court's jurisdiction to see whether or not the record shows racial discrimination, appellants quote from **Eubanks v Louisiana**, 356 US 584, 2 L ed 2d 991, 994, 78 S Ct 970, as follows:

"We are reluctantly forced to conclude that the uniform and long-continued exclusion of Negroes from grand juries shown by this record cannot be attributed to chance, to accident, or to the fact that no sufficiently qualified Negroes have ever been included in the lists submitted to the various local judges."

As to this Court's jurisdiction to review jury verdicts where Federal rights are involved, appellants quote from **Niemotko v Maryland**, 340 US 268, 271, 95 L ed 267, 270, 71 S Ct 325, 327, as follows:

"It is quite apparent that any disorderly conduct which the jury found must have been based on the fact that appellants were using the park without a permit, although, as we have indicated above, there is no statute or ordinance prohibiting or regulating the use of the park without a permit."

Appellee says under this argument that, "The Appellants were excluded from the golf course, not because of any racial reasons . . ."

The United States District Court said in its Opinion, which the Supreme Court of North Carolina said was before the State Courts, the following:

"The evidence does clearly show that white people were allowed to play by paying the greens fees without any questions and without being members. When Negroes asked to play, they were told that they would have to be members

before they could play and it clearly appears that there was no intention of permitting a Negro to be a member or to allow him to play, solely because of his being a Negro.

"The six plaintiffs presented themselves at the desk of the man in charge of the golf course and laid down 75 cents each and asked to play, the first named plaintiff being a dentist and practicing his profession in Greensboro. But they were not given permission to play. They insisted on their right to play and played three holes. While playing the third hole, the manager came and ordered them to leave, and they refused to go unless an officer arrested them. Whereupon the manager swore out a warrant charging each with trespass upon which they were tried, convicted and sentenced to 30 days in jail, the Statutory limit, from which an appeal is pending in the Supreme Court of North Carolina.

"The Negroes have not only been denied the privilege of the golf course, but there is no intention on the part of the defendants to permit them to do so unless they are compelled by order of court." (See Pages 11-12 of Statement as to Jurisdiction.)

Judge Johnson J. Hayes, who wrote those words, until he retired not long ago, had been for more than thirty years the only Federal Judge of the Middle District of North Carolina. He is a native of North Carolina and has lived in the State all his life. Appellants believe that some more compelling reason than any appearing in appellee's Motion to Dismiss, is necessary to support the suggestion that this assertion of appellee or even the finding of the State's Jury, should have higher standing than the Opinion of this distinguished Federal Jurist, whose long and intimate acquaintance with the local scene, gave him special competence to declare the facts and the law touching the Federal "constitutional rights" involved in this case.

Jurisdictional Question Still Foremost

While the jurisdictional question is still foremost as to whether or not this Court has jurisdiction to look into the record to determine whether or not there has been racial discrimina-

tion, since appellee has made this flat assertion that no racial discrimination was involved, appellants feel that it is not improper for them to suggest that, if the merits should be reached in this case, appellants are confident that they can show by materials which this Court will have authority to consider, not only that the Federal District Court spoke the truth when it said in its Opinion: **"Although the golf course has been available to the public for many years, whether by design or otherwise, Negroes have been denied the enjoyment of the privilege."** (See Page 10 of Statement as to Jurisdiction.) But appellants are also confident that they can show by such materials that on the night before the injunction of the Federal District Court was to take effect putting an end to racial discrimination at the golf course, the Club House mysteriously burned and immediately thereafter the City Council of Greensboro passed a resolution (contrary to its agreement with the Federal Government **"that the City of Greensboro would maintain and operate said golf course for the use and benefit of the public during the useful life of said golf course,"**—See No. 20, Page 71 of the Statement as to Jurisdiction), which resolution closed the golf course rather than obey the injunction of the Federal District Court against racial discrimination, and that the golf course has remained closed ever since to this very day.

The truth is that in all of the years of the operation of this golf course, built originally with 65 per cent of Federal funds, the only Negroes who have ever played on it were these appellants in this case, and for thus exercising their "constitutional rights" under the Federal Constitution, which rights have been declared to exist by the Federal Courts for North Carolina, these appellants will pay with jail sentences unless this Court intervenes.

I-A

Appellants believe that this Court has jurisdiction to determine whether or not the springe set by the State agencies to exclude Negro golfers in this case was so broad as to run afoul of the 14th Amendment without regard to the question of racial discrimination.

This Court is not unfamiliar with schemes, "whether attempted 'ingeniously or ingenuously' " (See **Cooper v Aaron**, supra), to circumvent the desegregation decisions of this Court. But in this case, apparently in an effort to be letter-perfect, there is a serious and substantial question as to whether or not the scheme here devised went so far that it offends the 14th Amendment, putting the question of race to one side.

It must be kept in mind that this was a public golf course, built with public funds, 65 per cent of the original cost coming from the Federal treasury. Under these circumstances, what was the scheme set up by the appellee's State agencies for this golf course? It comes unabashedly from the appellee's key witnesses in this case.

The Golf Assistant Pro, Clyde Bass, who was in charge when appellants sought to play golf, said he told appellants: **"I told them it was a private club for members and invited guests only."** (See Page 40 of Transcript of Record.)

The president of the appellee's State agency golf corporation almost boasted: **"The City had no voice in the operation of the golf course after the corporation took it up. We set up our own rules, we hired our own people. We paid the insurance for the various employees that we had. We operated completely on our own. The City had nothing whatever to do with it."** (See Page 74 of Transcript of Record.)

This same witness testified before the United States District Court. (See Page 77 of the Transcript of Record.) Here is what Judge Hayes said about what the City had to do with the golf course "after the corporation took it up":

"The facts show that the City is still 'in the saddle' so far as real control of the park is concerned and that the so-called lease can be disregarded, if and when, the City decides to do it. It also lends powerful weight to the inference that the lease was resorted to in the first instance to evade the City's duty not to discriminate against any of its citizens in the enjoyment in the use of the park." (See Page 14 of Statement as to Jurisdiction.)

Although only Negroes were ever made the victims of this

arbitrary delegation of the State's power, undoubtedly the delegation of power was broad enough in its terms to refuse membership in this "private club" to any citizen, including white citizens, and it is this very arbitrary power to operate "on our own" and to make "a private club" out of a public golf course, which brings this case within the type of situation which this Court held it had jurisdiction to review in **Niemotko v Maryland**, supra. There the Court said:

"This Court has many times examined the licensing systems by which local bodies regulate the use of their parks and public places . . . In those cases this Court condemned statutes and ordinances which required that permits be obtained from local officials as a prerequisite to the use of public places, on the grounds that a license requirement constituted a prior restraint on freedom of speech, press and religion, and, in the absence of narrowly drawn, reasonable and definite standards for the officials to follow, must be invalid."

Concurring, Mr. Justice Frankfurter said (See 95 L ed 278):

"The vice to be guarded against is arbitrary action by officials. The fact that in a particular instance an action appears not arbitrary does not save the validity of the authority under which the action was taken."

II

Appellee's second argument in its Motion to Dismiss (Page 10) reads:

"The Appellants Did Not Properly Present Any Constitutional Question Relating to the Effect of the Findings of Fact and Judgment of the Federal Court."

Appellants raised this and other Federal questions in pleadings, namely, a written Motion to Quash (See Pages 28-32 of Transcript of Record) and a written Motion to Set Aside the Verdict (See Pages 91-97 of Transcript of Record.)

The rule in such a situation was recently restated by this Court in **Staub v City of Baxley**, 355 US 313, 2 L ed 2d 302, 309, 78 S Ct 277, as follows:

"Whether a pleading sets up a sufficient right of action or defense grounded on the Constitution or a law of the United States, is necessarily a question of federal law; and where a case coming from a state court presents that question, this Court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court."

Although appellants quoted more at length from **Staub** (Pages 33-34 of the Statement as to Jurisdiction), appellee does not even mention the **Staub** case or the principles which govern under the decisions of this Court when Federal rights are asserted in pleadings.

In **Staub** this Court not only held that the sufficiency of such allegations **"is necessarily a question of federal law,"** but this Court also stated two other propositions in **Staub:**

(a) **". . . this Court must determine for itself the sufficiency of the allegations displaying the right or defense . . ."**

(b) That in such a situation it is within this Court's **"province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect . . ."**

It is true that, so far as the Motion to Quash is concerned, the North Carolina Supreme Court said that the Federal **"right or defense"** required evidence "aliunde the record," which was not permissible under State practice. But appellants say:

(a) That under **Staub** this determination was one of **"a question of federal law"** which this Court has jurisdiction to review, especially since under State practice other Federal rights may be asserted under a motion to quash (See **State v Perry**, 248 NC 334, 103 SE 2d 404), thus discriminating as between Federal rights (See **Williams v Georgia**, 349 US 375, 99 L ed 1161, 75 S Ct 814.)

(b) Since appellee did not answer to deny the allegations of the Motion to Quash, no evidence was necessary and the allegations should have been taken as true as appearing on the face of the record. See **Tomkins v Missouri**, 323 US 485, 89 L ed 407, 65 S Ct 370.

Motion to Set Aside Verdict Was Decided on the Merits.

While all that has been said above concerning the Motion to Quash applies equally to the Motion to Set Aside the Verdict, the latter motion was decided on the merits, the Supreme Court of North Carolina using more than three printed pages in doing so. (See Pages 50-53 of the Statement as to Jurisdiction.) There is not the slightest suggestion anywhere in the State Court's Opinion that the Motion to Set Aside the Verdict was denied on any ground of State practice or procedure. Curiously enough, appellee does not quote anything from the State Court's Opinion which even appellee claims to sustain its contention in this regard.

Under this argument appellee also says the following with regard to the contention of appellants that the Federal Constitution, including the Supremacy Clause, required the State Courts to notice and give effect to the Federal Court's determinations in the **Simkins** case (See Page 13 of the Motion to Dismiss): "(1) In their Motion to Quash, the Appellants said they would introduce the Record in evidence, and (2) The trial court was never asked to pass upon the question of judicial notice."

As to No. (1), both the Motion to Quash and the Motion to Set Aside the Verdict said the following, instead of what appellee says (See Page 18 of Statement as to Jurisdiction.):

"(c) These defendants have subpoenaed the Clerk of the United States District Court for the Middle District of North Carolina to bring to this trial the full record and judgment roll in said case and respectfully request an opportunity to offer this evidence upon the hearing of this motion."

The trial court denied each motion summarily without requiring the State to answer and without giving appellants the requested **"opportunity to offer this evidence upon the hearing of this motion."** (See Page 43 of Statement as to Jurisdiction and Page 97 of the Transcript of Record.)

As to No. (2) appellants say that they did ask the trial court "to take judicial notice" and "to give effect to" the Federal proceedings, (See Pages 92-93 of Transcript of Record.), and:

(a) Appellants in their Motion to Set Aside the Verdict set out verbatim the following from the Federal Court records: The Declaratory Judgment and Findings of Fact No. 33 and No. 30. The Supreme Court of North Carolina says in its Opinion that the Opinion of the Federal Court was before the trial court. It was thus not necessary to ask the trial court to take judicial notice of records alleged verbatim and not denied by appellee in any way, or of the Federal Court's Opinion, which the State Supreme Court said was before the trial court.

(b) In **Lilly v Grand Trunk Western Railroad Co.,** 317 US 481, 488, 87 L ed 411, 416, 63 S Ct 347, a similar contention was made and answered by this Court as indicated in the following quotation:

"Respondent insists that reliance cannot be placed on Rule 153 because it was not called to the attention of the trial court or the jury and its injection now would involve deciding the case on issues not submitted to the jury. We do not regard this point as well taken. No claim is advanced that the rule is invalid, and we see no reason for questioning it. Adopted in the exercise of the Commission's authority, Rule 153 acquires the force of law and becomes an integral part of the Act . . ., to be judicially noticed."

(c) Appellants believe that the determinations of the Federal Courts interpreting the 14th Amendment and establishing the "constitutional rights" of appellants under that Amendment, likewise became an integral part of Federal law, **"to be judicially noticed."** In **Cooper v Aaron,** supra, quoting from Chief Justice Marshall, this Court said: " 'If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, **and destroy the rights acquired under those judgments,** the constitution itself becomes a solemn mockery . . . . . ' " (Emphasis added.)

III

Appellee's third argument (Page 14 of Motion to Dismiss) reads:

"There Is No Substantial Question As to Former Jeopardy."

The question of double jeopardy was raised by appellants

in both their Motion to Quash and their Motion to Set Aside the Verdict. The Supreme Court of North Carolina clearly decided the question on the merits as follows: **"It is manifest there is here no double jeopardy."** (See Page 44 of Statement as to Jurisdiction.)

Certainly, as appellants believe, where the State has instituted three successive criminal proceedings against six Negroes for playing on a public golf course under circumstances which the Federal Courts for North Carolina have held represented their "constitutional rights" to play and have held further that the State has "unlawfully denied" these "constitutional rights," the claim of double jeopardy under the Federal Constitution cannot be said to be so unsubstantial as to deprive this Court of jurisdiction to hear the claim of double jeopardy on the merits.

In **Hoag v New Jersey,** 356 US 464, 2 L ed 2d 913, 918, 78 S Ct 829, it is said: **"In the last analysis, a determination whether an impermissible use of multiple trials has taken place cannot be based on any overall formula."** It was also said (2 L ed 2d 917): **"The question in any given case is whether such a course has led to fundamental unfairness."** One test referred to by Mr. Justice Harlan for the Court was **"unduly harassing an accused."**

In his concurring opinion in **Brock v North Carolina,** 344 US 424, 429, 97 L ed 456, 460, 73 S Ct 349, Mr. Justice Frankfurter indicated a test of double jeopardy as conducting successive trials **"merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time."**

Appellants believe that under the facts and circumstances of this case the three successive criminal proceedings against them for the same alleged offense present very serious questions of **"fundamental unfairness"** and of **"unduly harassing"** them for and in the exercise of their "constitutional rights." Appellants also believe that, if this case should reach the merits, a serious question will be presented as to whether or not these multiple criminal proceedings took place because the prosecutor was "incompetent or casual or even ineffective"

in presenting the first two sets of criminal proceedings which failed in the State Courts.

The basic philosophy of double jeopardy was stated for the Court by Mr. Justice Black in **Green v United States**, 355 US 184, 2 L ed 2d 199, 204, 78 S Ct 221, as follows:

"The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

IV

The appellee's fourth argument and its first sentence under that argument (Page 18 of Motion to Dismiss) read as follows:

"The Effect of the Supremacy Clause of the United States Constitution."

"The Appellants contend that under Article VI, Clause 2, of the Federal Constitution, the Supreme Court of North Carolina was bound to recognize the federal cases dealing with golf courses, and when this is done Appellants should be declared Not Guilty."

Appellants contend no such thing. What they do contend, among other things, is:

First. That they alleged in their Motion to Set Aside the Verdict the following (See Page 92 of Transcript of Record):

"II. That the Supremacy Clause (Article VI) of the Constitution of the United States requires this Court to give effect to and to enforce the judgments of the United States Courts covering the subject matter of this prosecution, particularly the 'Decree and Injunction' of the United States District Court for the Middle District of North Carolina, in Civil Case No. 1058, in which these defendants were plaintiffs and Gillespie Park Golf Club, Inc., was one of the defendants, covering the identi-

cal acts and conduct charged by the State to be a crime of trespass in this case, said 'Decree and Injunction' reading in part as follows:

"It is now ordered, adjudged and decreed that defendants have unlawfully denied the plaintiffs as residents of the City of Greensboro, North Carolina, the privileges of using the Gillespie Park Golf Course, and that this was done solely because of the race and color of the plaintiffs, and constitutes a denial of their constitutional rights, and unless restrained will continue to deny plaintiffs and others similarly situated."

That appellants further alleged in said Motion to Set Aside the Verdict that the United States District Court for the Middle District of North Carolina had specifically found in its Finding of Fact No. 30 that Gillespie Park Golf Club, Inc. was an agency of appellee State of North Carolina, said Finding reading on this point (See Page 96 of Transcript of Record) **"that under these circumstances said corporation was in fact an agency of the City and the school board for the continued maintenance and operation of the golf course for the convenience of the citizens of Greensboro."**

Second. That appellee State of North Carolina did not answer and did not in any way deny or controvert the allegations of the Motion to Set Aside the Verdict, and that said allegations must therefore be taken as true. (See **Tomkins v Missouri,** supra.)

Third. That appellants further alleged in their Motion to Set Aside the Verdict that to permit the verdict to stand **"would violate the rights of these defendants under the Constitution and laws of the United States, including the due process and equal protection clauses of the 14th Amendment."**

Fourth. That the trial court summarily denied the Motion to Set Aside the Verdict without requiring the appellee State to answer the allegations (See Page 97 of Transcript of Record), and that the Supreme Court of North Carolina used more than three printed pages in upholding this denial of the motion on its merits. (See Pages 50-53 of Statement as to Jurisdiction.)

Fifth. That the Supreme Court of North Carolina closed its

lengthy discussion of the Motion to Set Aside the Verdict with these significant words: **"Defendants were not, as a matter of right, entitled to have the verdict set aside."** (See Page 53 of Statement as to Jurisdiction.)

Appellants respectfully submit that these words of the Supreme Court of North Carolina can mean only that the uncontroverted allegations of the Motion to Set Aside the Verdict were insufficient to establish the Federal "right or defense" alleged, and that since under **Staub v City of Baxley,** supra, **"the sufficiency of the allegations displaying the right or defense" "is necessarily a question of federal law,"** the Supreme Court of North Carolina has here clearly decided the Federal questions raised by the Motion to Set Aside the Verdict on their merits.

For, since under **Staub "this Court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court,"** if this Court on its independent appraisal of the allegations should determine them to be sufficient, when uncontroverted as here, to establish "the right or defense" alleged, then appellants **would be** entitled as a matter of right to have the verdict set aside, contrary to the holding by the North Carolina Supreme Court that appellants "were not, as a matter of right, entitled to have the verdict set aside."

V.

Appellee's fifth argument (Page 20 of Motion to Dismiss) reads:

"Appellants Are Required to Present Federal Questions in State Courts According to State Practice."

Appellee seems completely to overlook the other principle, stated by Mr. Justice Holmes in **Davis v Weschler,** 263 US 22, 24, 68 L ed 143, 145, 44 S Ct 13, and recently restated for the Court by Mr. Justice Whittaker in **Staub v City of Baxley,** supra: **" 'Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.' "**

Besides, appellee does not quote a single word from the Opinion of the Supreme Court of North Carolina in this case which even suggests that the Federal questions raised by appellants in their Motion to Set Aside the Verdict were not **"plainly and reasonably made,"** or that they were improper under any rules of State practice. The truth of the matter is that there is no such word in the North Carolina Supreme Court's lengthy discussion of the Motion to Set Aside the Verdict.

Curiously, appellee under this argument talks about **"a motion in arrest of judgment,"** which would have been **a motion made after the trial court had entered its judgment upon the verdict,** and cites some North Carolina cases which appellee says states the local rule applying to motions in arrest of judgment. But the short answer to this is that appellants made no such **motion in arrest of judgment,** but rather filed a written Motion to Set Aside the Verdict **before the trial court had entered judgment upon the verdict.**

Under this argument appellee also says that appellants **"have not really attacked the validity of the statute but the authority exercised under the statute; and, therefore, we say that no appeal lies to this Court under 28 USC sec. 1257 (2). . ."**

In both their Motion to Quash and their Motion to Set Aside the Verdict appellants alleged **"that GS 14-134 is hereby being unconstitutionally applied to these defendants"** (appellants here), for reasons under the Constitution of the United States which appellants set out in considerable detail in both motions. (See Pages 28 and 91 of Transcript of Record.)

When the State agencies of appellee **"unlawfully denied the plaintiffs** [appellants here] **as residents of the City of Greensboro, North Carolina, the privileges of using the Gillespie Park Golf Course . . . solely because of the race and color of the plaintiffs"** (appellants here), as duly determined by the United States District Court for the Middle District of North Carolina (See Page 92 of Transcript of Record), those State agencies were not exercising any authority under the criminal trespass statute (GS 14-134). Instead, they were exercising

powers of ownership and possession duly delegated to them by the appellee State.

The appellee then stepped in to vindicate and make good this unlawful interference with the "constitutional rights" of appellants by supporting the unlawful acts of its agencies with the criminal sanctions of this trespass statute (GS 14-134). It is this application of the criminal trespass statute (GS 14-134) which appellants alleged, and still contend, makes that statute unconstitutional as applied in this case.

This is exactly what happened in **Marsh v Alabama,** 326 US 501, 90 L ed 265, 66 S Ct 276; and that is why appellants believe that **Marsh** is a complete authority sustaining the jurisdiction of this Court to reach the merits in this case.

VI

Appellee's sixth argument (Page 24 of the Motion to Dismiss) reads:

"The Supreme Court of North Carolina Decided This Case on an Independent Non-Federal Ground Sufficiently Adequate to Support the State Court Judgment and Upon a Non-Federal Ground That Is Tenable."

Appellee does not take the trouble to state precisely what that independent and adequate non-Federal ground is, and does not quote a single word from the Opinion of the Supreme Court of North Carolina which purports to set forth that independent and adequate non-Federal ground.

The truth is that there is no word in the Opinion of the Supreme Court of North Carolina which even suggests that the Court's decision upholding the trial court's denial of the Motion to Set Aside the Verdict was based upon any non-Federal ground whatsoever. Instead, the North Carolina Supreme Court concluded its discussion of the Motion to Set Aside the Verdict with this statement: **"Defendants were not, as a matter of right, entitled to have the verdict set aside."** Since the Federal questions raised in the Motion to Set Aside the Verdict were presented in a written pleading, their sufficiency to establish appellants' right to have the verdict set aside because

in violation of the "constitutional rights" of appellants under the Constitution of the United States, under the **Staub** case, supra, was **"necessarily a question of federal law,"** and the decision of the State Court was thus necessarily the decision of **"a question of federal law."**

FINALLY

The Question of Offering the Records of the Federal Courts in Evidence.

At more than one place in its Motion to Dismiss, appellee emphasizes its contention that the records of the Federal Court proceedings in the **Simkins** case were not offered in evidence. (E. g. Pages 11 and 23). Appellants' answers are as follows:

1. As to the Opinion of the Federal District Court (149 Fed Supp 562), the Supreme Court of North Carolina conceded that this was before the State Courts, presumably on the basis of judicial notice. **"Our knowledge of the facts in that case is limited to what appears in the published opinion,"** the Court said. (See Page 50 of Statement as to Jurisdiction.)

Under these circumstances it would seem absurd to suggest that it was necessary to offer in evidence that Opinion of the Federal Court. It is reproduced on Pages 10-16 of the Statement as to Jurisdiction.

2. As to the Declaratory Judgment of the Federal District Court and two of its key Findings of Fact, namely, No. 33 and No. 30, these were alleged **verbatim** by appellants in their Motion to Set Aside the Verdict. (See Pages 92, 94, and 98, respectively, of the Transcript of Record.) The appellee did not deny or controvert or question the correctness in any way of these reproductions of the Declaratory Judgment and Findings of Fact No. 33 and No. 30.

Under these circumstances appellants believe that the Declaratory Judgment, Finding of Fact No. 33, and Finding of Fact No. 30 were before both the trial court and the Supreme Court of North Carolina as a matter of uncontroverted pleading. In this connection the rule stated in **Staub v City of Baxley**, supra, must be kept in mind at all times: **" 'Whether a pleading**

sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of Federal law, and where a case coming from a State Court presents that question, this Court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court.'"

3. As to the question of judicial notice of the judgment roll, as might become necessary for the State Courts to determine their duty with regard thereto under the Supremacy Clause of the Constitution of the United States (Article VI, Clause 2), appellants made the original papers in the **Simkins** case, in possession of the Deputy Clerk of the United States District Court for the Middle District of North Carolina, available to the trial court (Page 69 of Transcript of Record), and made available duly certified copies of the main records in the case for the convenience of the Supreme Court of North Carolina. (See Pages 182-184 of Transcript of Record.)

One type of material coming within the realm of judicial notice has been said to be that which **"is capable of immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy."** (See Morgan, **"Judicial Notice,"** (1944) 57 Harvard Law Review 269, 286-87.) The original as well as duly certified copies of the records of the United States Courts would seem to meet this test of judicial notice.

Besides, the determinations of the Federal Courts in this case would seem to appellants to constitute a construction of the 14th Amendment and the establishment of and placing the imprimatur of that Amendment upon specific "constitutional rights" of appellants, comparable to what Mr. Justice Douglas said for the Court in **Railway Employes' Department etc. v Hanson**, 351 US 225, 232, 100 L ed 1112, 1130, 76 S Ct 714: **"A union agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur of the federal law upon it and, by force of the Supremacy Clause of Article VI of the Constitution, could not be made illegal nor vitiated by any provision of the laws of a State."**

Even the Supreme Court of North Carolina, quoting from **25 Ruling Case Law, Sec. 209**, has heretofore held that, "In

construing a Federal statute, a state court is bound by the construction placed on it by the Federal courts." (See **Mangum v Atlantic Coast Line Railway,** 188 NC 689.)

It would seem that a fortiori, judicial notice should be taken of the construction placed upon the various provisions of the Constitution of the United States by the Federal Courts. In this case the Federal Courts for North Carolina had held prior to the drawing of the warrants involved in this case that the appellants had "constitutional rights" to perform the identical acts which appellee, State of North Carolina, charges to be a crime of trespass under its trespass statute, GS 14-134.

But the main point which appellants suggest here is that certainly these contentions with regard to judicial notice are not so unsubstantial as to deprive this Court of jurisdiction to consider them on the merits.

4. The simple truth is, moreover, that the Federal Records which it is said by appellee were not offered in evidence were in fact offered in evidence as "Defendants' Exhibits 6 and 7," and their admission was refused by the trial court.

On Page 77 of the Transcript of Record appears the following:

"EXCEPTION No. 22:

"Mrs. Kennedy: If your Honor please, we'd like, if possible, to have a ruling on whether or not these would be admissible.

"Court: I am going to sustain the objection as to those two Exhibits, that is No. 6 and No. 7.

"EXCEPTION No. 22."

Appellants attach hereto photographic reproductions of Pages 58 and 59, marked Appendix I and Appendix II, of the original "Transcript of Testimony" furnished to counsel for appellants in the State trial court by the Official Court Reporter in the trial of this case.

By some quirk of inadvertence the identification of the Federal Records as "Defendants' Exhibits 6 and 7", as shown by said Appendices, was omitted entirely from the record which went to the Supreme Court of North Carolina on appeal.

On Page 14 (Page 121 of Transcript of Record) of appellants' brief before the Supreme Court of North Carolina, the true fact was called to the attention of the Court by the following: "The Court erred in refusing to admit defendants' Exhibits 6 and 7, as set out in Exception No. 22. These exhibits were the decrees, the findings of fact, conclusions of law and opinion of the Federal District Court in the **Simkins** case and the opinion of the Court of Appeals, Fourth Circuit, in the same case."

Exercising its wide discretion to go outside the record for vital information concerning the true facts as to what transpired in the lower courts (See **Mason v Commissioners of Moore,** 229 NC 626, 627, 51 SE 2d 6, **and Aycock v Richardson,** 247 NC 234, 100 SE 2d 379.), the Supreme Court of North Carolina went outside the record (it could not be found in the record) to find, with reference to the records of the Federal Court proceedings, that **"the defendants had the record in that case identified. . . ."**

But by some quirk of inadvertence the Supreme Court of North Carolina failed to notice that the Federal Court records were identified as "Defendants' Exhibits 6 and 7," and therefore erroneously came to the conclusion that appellants did not offer these records in evidence.

In view of the North Carolina Supreme Court's wide discretion (See **Williams v Georgia,** supra.) to go beyond the record to get at the truth, appellants do not believe that, if offering these Federal Court records in evidence should become a material issue upon the question of jurisdiction, the above-mentioned quirks of inadvertence will render this Court powerless to reach the merits of this case. Appellants could not call this to the attention of the State Court because no petition for rehearing is permitted in a criminal case in the Supreme Court of North Carolina. (See **State v Council,** 129 NC 371 (511), 39 SE 814, and Certificate of the Clerk of the Supreme Court of North Carolina at the beginning of the Transcript of the Record.)

Nor do appellants believe that, if this case should reach oral argument, the representatives of appellee will tell this

Court that the true facts about offering the Federal Court records in evidence are other than as herein set forth. On the merits, if the case should reach the merits, appellee would also have an opportunity to say what "Defendants' Exhibits 6 and 7" were if they were not the Federal Court records.

Conclusion

Wherefore, appellants pray that this Court enter an order denying appellee's Motion to Dismiss, and noting probable jurisdiction in this case or, in the alternative, that consideration of the question of jurisdiction be postponed until a hearing of this case on the merits. Further, appellants pray that, if they should be mistaken in their belief that this Court has jurisdiction of this appeal under 28 USC 1257 (2), then that the appeal papers in that event be treated as a Petition for Certiorari under 28 USC 2103, and that such Petition be granted.

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Note: References to "Statement as to Jurisdiction" herein refer to Appellants' STATEMENT AS TO JURISDICTION filed in this case.

MR. MARSH: I have no further question.

MR. KONNEGAY: No questions.

WITNESS EXCUSED.

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MRS. KENNEDY: Your Honor, the defendants would like now to introduce our exhibits into evidence.

THE COURT: Which ones?

MRS. KENNEDY: Exhibit 1, Exhibit 2, Exhibits 3, 4, and 5.

MR. KONNEGAY: OBJECTION.

THE COURT: OVERRULED.

(The exhibits previously marked for identification DEFENDANTS' EXHIBITS 1, 2, 3, 4, and 5, introduced in evidence.)

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MYRTLE D. COBB, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MRS. KENNEDY:

Q Will you state your name and address, please?

A I am Myrtle D. Cobb. I am deputy clerk in the Federal Court in Greensboro.

Q As Deputy Clerk in the Federal Court here in Greensboro, is it part of your duty to keep public records?

A Yes, it is.

Q Do you have a record in the case of Simkins, et al, vs. Gillespie Park Golf Course, et al?

A This is the case. It is all the original papers that went up to the Court of Appeals that was filed in our office.

Q Were the findings of fact part of that record?

A Yes.

MRS. KENNEDY: Your Honor, at this time we'd like to offer into evidence a decree, the findings of fact, conclusions of law and opinion, as rendered by the Judge of the Federal Court, Middle District of Greensboro.

MR. KORNEGAY: OBJECTION.

THE COURT: Do you have anything further that you want to introduce in regard to that?

MRS. KENNEDY: In addition to that, we have the opinion of the Circuit Court of Appeals on this case.

MR. KORNEGAY: OBJECTION.

THE COURT: Let the record show that is being offered in evidence. I will rule on it later.

(The documents referred to were marked for identification DEFENDANTS' EXHIBITS 6 and 7.)

THE COURT: Anything else?

MRS. KENNEDY: Not with this witness, your Honor.